

1 LAURA E DUFFY
2 United States Attorney
3 CAROLINE P. HAN
4 Assistant U.S. Attorney
5 California Bar No.: 250301
6 880 Front Street, Room 6293
7 San Diego, CA 92101
8 Tel: (619) 546-6968
9 Fax: (619) 546-0831
10 Email: caroline.han@usdoj.gov

11 Attorneys for the United States

12 **UNITED STATES DISTRICT COURT**

13 **SOUTHERN DISTRICT OF CALIFORNIA**

14 UNITED STATES OF AMERICA,

15 Plaintiff,

16 v.

17 ABDIAZIZ HUSSEIN,
18 Defendant.

Case No.: 13CR1514-JM

**UNITED STATES' RESPONSE AND
OPPOSITION TO DEFENDANT'S
MOTION FOR NOTICE PURSUANT TO
50 U.S.C. §§ 1806(c), 1881e(a)**

19 COMES NOW the UNITED STATES OF AMERICA, by and
20 through its counsel, Laura E. Duffy, United States
21 Attorney, Caroline P. Han, Assistant United States
22 Attorney, and respectfully submits the following Response
23 and Opposition to Defendant's Motion for Notice Pursuant
24 to 50 U.S.C. §§ 1806(c), 1881e(a).
25
26

27 //

28 //

1 The defendant has moved the Court to compel the
2 United States to inform the defendant whether the
3 electronic surveillance the United States intends to use
4 against the defendant was "(1)...conducted pursuant to
5 the pre-2008 provisions of FISA or, instead the FAA; and
6 (2) whether any FISA order was granted in reliance on
7 information obtained or derived from an FAA surveillance
8 order." The basis for his motion appears to be
9 speculation resulting from filings in both related and
10 unrelated cases. [Def. Mtn. 9-10.] For the reasons set
11 forth below, the United States has provided the defendant
12 with proper notice and the defendant's motion should be
13 denied.¹

14 When the government "intends to enter into evidence
15 or otherwise use or disclose" any "information obtained
16 or derived from" electronic surveillance or physical
17 search conducted pursuant to the Foreign Intelligence
18 Surveillance Act (FISA) against an aggrieved person² in a
19

20 ¹ The defendant has made a number of assertions in support of his
21 motion; without addressing the accuracy or merits of all of these
22 individually, the United States submits that the motion can be
23 resolved - and denied - on the grounds set forth herein.

24 ² An "aggrieved person" is the target of the electronic surveillance
25 or "any other person whose communications or activities were
26
27
28

1 criminal case (as well as in other proceedings), it must
2 provide notice to that individual. 50 U.S.C. §§ 1806(c);
3 1825(d); 1881e.

4
5 The government's notice obligations regarding its use
6 of FISA information under §§ 1806, 1825, and 1881e apply
7 only if the government(1) "intends to enter into evidence
8 or otherwise use or disclose" (2) "against an aggrieved
9 person" (3) in a "trial, hearing or other proceeding in
10 or before any court, department, officer, agency,
11 regulatory body, or other authority of the United States"
12 (4) any "information obtained or derived from" (5) an
13 "electronic surveillance [or physical search] of that
14 aggrieved person." 50 U.S.C. § 1806(c); see 50 U.S.C. §
15 1825(d). Where all five criteria are met, the government
16 will notify the defense and the Court (or other
17 authority) in which the information is to be disclosed or
18 used that the United States intends to use or disclose
19 such information.
20
21
22
23
24
25
26

27 subject to electronic surveillance." 50 U.S.C. §1801 (k). A
28 person is also aggrieved if his or her "premises, property,
information, or material is the target of physical search" or
subject to physical search." 50 U.S.C. § 1821(2).

1 As required by 50 U.S.C. §§ 1806(c), the United
2 States has notified the defense and this Court that it
3 intends to use against the defendant in this case
4 evidence obtained or derived from electronic surveillance
5 under Title I of FISA, 50 U.S.C. §§ 1801-1812.³ The
6 United States would likewise provide notice to the
7 defense and this Court if the United States intended to
8 use in this case any information obtained or derived from
9 surveillance authorized under Title VII of FISA (the FISA
10 Amendments Act or FAA) (i.e., a Section 702 Order), 50
11 U.S.C. § 1881a *et seq.*, as to which the defendant is an
12 aggrieved person. No such notice has been provided. Nor
13 should such notice be provided in this case because the
14 United States does not intend to use any such evidence
15 obtained or derived from FAA-authorized surveillance in
16 the course of this prosecution.

17 To the extent defendant seeks to know what
18 information may or may not have been presented to the
19 Foreign Intelligence Surveillance Court (FISC) to obtain

20 ³ The FISA Notice apprised the defendant that the United States
21 intended to use evidence obtained or derived from electronic
22 surveillance and physical search against the defendant; however, to
23 clarify, the United States does not intend to use evidence obtained
24 or derived from physical search against the defendant.

1 FISA warrants and orders, section 1806(c)'s notice
2 requirement does not entitle him to that information.
3 Rather, section 1806(f) of FISA provides the only process
4 by which a defendant may seek to discover applications,
5 orders, and other related materials provided to the FISC.⁴
6 Section 1806(f) also provides for an ex parte, in camera
7 review by the Court of the classified materials submitted
8 by the government in response to a defendant's motion to
9 disclose FISA materials, to determine if such disclosures
10 are necessary.⁵
11
12

13 //
14
15

16 ⁴See 50 U.S.C. § 1806(f) (describing the process that is followed
17 when an aggrieved person files a motion "to discover or obtain
18 applications or orders or other materials relating to electronic
19 surveillance or to discover, obtain, or suppress evidence or
20 information obtained or derived from electronic surveillance under
21 the Act").

22 ⁵Section 1806(f) permits the Court to order disclosure of FISA
23 materials to the defendant only if the Court determines, after
24 considering the government's classified filing *ex parte* and *in*
25 *camera*, that doing so is "necessary to make an accurate
26 determination of the legality of the surveillance." Section
27 1806(g) permits the Court to order disclosure of any FISA materials
28 as required by due process. Those (and their parallel provisions
for physical searches) are the only statutory bases on which the
Court may order disclosure of FISA materials, and they do not come
into play until after the defendant files the appropriate motion
and the Court considers the government's classified response and
attachments. Upon such review, no court has ever required the
government to disclose the information that was presented to the
FISC to obtain a FISA warrant or order. In re Grand Jury
Proceedings of the Special Apr. 2002 Grand Jury, 347 F.3d 197, 203
(7th Cir. 2003) (noting no court has ever ordered disclosure of
FISA materials).

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

DATED: October 11, 2013

LAURA E. DUFFY
United States Attorney

13CR1514-JM